Petitioner filed an application for post-conviction relief under Fla.R.Crim.Proc. 3.850 on March 1, 2000, raising one claim:

"Defense counsel's failure to maker an appropriate objection to [removal] of the general public from the courtroom while the child testified resulted in the defendant being deprived of his sixth amendment right to a public trial and the consequent waiver of the defendant's right to appeal that error." (id.)

The trial court summarily denied the post-conviction application and was affirmed on appeal in a per curiam opinion. *LaPlante v. State*, 829 So.2d 216 (Fla. 2d DCA 2000).

The following occurred at the trial with regard to closing the courtroom to the general public and Petitioner's immediate family. The following is taken directly from the district court's April 20, 2004, order denying the Petition and contains not only the relevant portions of the trial transcript, but also the district court's analysis thereof: (App. 4, 13-17):

"Petitioner's argument that his right to due process was violated when the trial court ordered that the courtroom be cleared while the child victim testified has no merit. A review of the transcript confirms that Petitioner had notice that the prosecution would be requesting the trial court to clear the courtroom and that he had a meaningful opportunity to be heard on the issue:

"' Prosecutor: ...I recognize we have several spectators out here. My concern is that my first witness is going to be the six-year-old girl. And I'm going to ask that sometime after opening the court be cleared.

The Court: Okay.

Prosecutor: In order that we have the child testify in relative calm.

The Court: You have any objection?

Trial Counsel: No. Your Honor.'

Dkt. 10, Ex. 001, Vol. II at 83. After opening statement, the following exchange occurred between counsel and the trial judge, initially during a bench conference.

'The Court: You need to remove the jury while I tell everybody that I'm going to remove the courtroom. I plan on telling everybody because the attorney is requesting that I clear the courtroom.

Prosecutor: I don't have a problem if the Defense has no objection to

Trial Counsel: Obviously, I would object only to the – I object to my client's family being excluded.

The Court: If I exclude one, I'm excluding everybody.

Trial Counsel: I thought Ms. Corces was only directing it towards the students. Then I don't join in the application. I think it would deny him of his Sixth Amendment right.

The Court: I don't think he has a right to have have [sic] all the family members during the testimony of the child victim in a sexual battery case. He has a right to be present, but I don't think he has a right to have all of his family members present during that testimony. So I'm going to clear the courtroom.

My only concern is do you want me to remove the jury and then tell every one I'm clearing the courtroom or do you want me to do it now in front of the jury?

Trial Counsel: No, I would ask you to excuse the jury.

Prosecutor: If I many, Judge, I believe it is permissible to have a victim's advocate or someone on behalf of the victim to be present.

The Court: That's true and that's going to happen.

Trial Counsel: And, Judge, that's again—that's our basis for requesting that although, again, we're not raising any complaint to members of the general public other that [sic] the members of LaPlante's family. His mother, father, two sisters, and a brother are currently present. I ask that they be allowed to stay throughout the entire process since they are not witnesses.

The Court: Okay. Take the jury out, please.

(Jury taken out at 10:45)

[The Court:]Ladies and Gentlemen, there's been a request by the attorneys that because of the young age of the child, they don't want members of the public present. And I'm going to respect that request. So at this time I'm going to direct the bailiffs to clear the courtroom, please.

Prosecutor: This is Kathy Shuck. This is the aunt of A.S.

The Court: Okay.

Trial Counsel: Judge, again, with the greatest respect to the Court any my advisory [sic], now that the public has been excluded, while I certainly have no objection

to Ms. Shuck being present as a victim advocate since she's acting in that capacity, not as a witness. Am I correct? She's not a witness.

Prosecutor: No, she's not.

Trial Counsel: Judge, I have to request on behalf of my client, I have to object, to his mother, father, two sisters and a brother being excluded since they are all adults. There's no reason to believe that they would disrupt the Court. I can understand certainly students, a class of students being here or general members of the public.
But, I think that relatives and close friends of the defendant, certainly, family, I think raises a Sixth Amendment right to a public trial. And I wanted to raise that I object, most respectfully, so in case there is a conviction, we would have that reserved.

The Court: All right. I disagree with you in the fact that this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs any Sixth Amendment right that he may have to have the members of his family present.
I would wholeheartedly agree with you, sir, that if I cleared the courtroom of every one including him, that that would be a problem. But he's allowed to stay. And I think the child has a right to have a child's advocate, a victim's advocate present. And every one else has been excluded.

And I think that the case law is clear on that, that the protection of this child will at this point outweigh the rights of the defendant to have members of his family present during the testimony of this child in areas that are going to be extremely sensitive to the child and possibly traumatic.

So I understand your objection, sir, and I'm overruling it. Call your first witness.'"

(App. 4 at 13-17)

"The reason for the prosecutor's request to exclude the public is apparent. She intended to introduce the testimony of the six-year-old victim regarding her contact with the Petitioner, the man alleged to have sexually battered her. The trial court, pursuant to Fla. Stat. §918.16, and without objection from defense counsel, excluded the general public from the trial during the child's testimony. Over objection, members of Petitioner's immediate family were excluded as well. The trial court determined that the interests of the victim outweighed the rights of Petitioner to have members of his family present in the courtroom during the victim's testimony. See, Dkt. 10, Ex. 001, Vol. 1 at Tr. 101-105.

'The Court: All right, I disagree with you in the fact that this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs any Sixth Amendment rights of the defendant to have members of his family present.

*****

And I think that the case law is clear on that, that the protection of the child will at this point outweigh the rights of the defendant to have members of his family present during the testimony of this child in areas that are going to be extremely sensitive to the Child and possibly traumatic.'

(Dkt. 10, Ex. 001, Vol. I at Tr. 104-105)

Petitioner has not established that the trial court's decision to close the courtroom during the child victim's testimony was contrary to or an unreasonable application of the Supreme Court holding in Waller, and its progeny. The trial court made sufficient factual findings to enable a review of whether the decision to close the trial was appropriate and no broader than necessary to protect the child's interest, considering Supreme Court precedent. Those findings

addressed the child's tender age, the sensitive and potentially traumatic nature of her expected testimony and the necessity of protecting her interests over the Sixth Amendment rights of Petitioner. The [trial] court appropriately weighed the competing interests, considered the manner in which the competing interests could best be served and found that the state had an overriding interest in the victim's welfare which outweighed Petitioner's Sixth Amendment right to a public trial. Petitioner has failed to demonstrate by clear and convincing evidence that the state court's decision was contrary to or an unreasonable application of clearly established Supreme Court law or an unreasonable determination of the facts in the light of the evidence. See 28 U.S.C. 2254(d). Accordingly, Petitioner has not established that he is entitled to relief on this claim." (App. 4 at 17-18)

In an order dated April 15, 2003, the district court found that, "Thus, Petitioner's claim of denial of his right to a public trial is before this Court based on two per curiam opinions form the state appellate court and on sua sponte opinion from the trial court in denying the Rule 3.850 [post-conviction] motion. None of these decisions contain any findings of fact entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1)." (App. 3 at 9)

However, in footnote 4 in the April 20, 2004 order, quoted at length above, the district court retreated from this earlier finding and stated, "Upon closer examination of the transcript of the proceedings in light of the Waller four-prong test, this Court recedes from that observation and finds that the trial court articulated sufficient findings in support of its decision to close the trial during the victim's testimony." (App. 4 at 18 n. 4)

Appeal was taken from the district court's order on May 13, 2004. (App. 5) The district court granted Petitioner's motion for a certificate of appealability on

the sole issue of, "Whether the Florida trial court's closure of the courtroom during the 6-year-old child victim's testimony complied with the four-part test set out in *Waller v. Georgia*, 467 U.S. 39, 46 n. 4 (1984), as applied in *Judd v. Haley*, 250 F.3d 1308, 1314 (11th Cir. 2001), Fla. Stat. §918.16 notwithstanding. (sic)" (App. 5)

On August 27, 2004, the Eleventh Circuit denied Petitioner's motion to expands the certificate of appealability to include issues involving Florida Statute 918.16, which, in violation of *Waller*, allows the courtroom to be closed during a criminal trial based on the mere fact that a child is testifying in a sex abuse case. (App. 6). On October 6, 2004, this decision was reaffirmed by the Eleventh Circuit. (App. 7)

On June 7, 2005, a panel of the Eleventh Circuit affirmed the denial of the writ of habeas corpus (App. 8) The panel found that the case was governed by *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The panel further held that this Court held in *Waller* that in order for the closure of a court during a criminal trial to be in accordance with the Sixth Amendment, the following requirements must be met:

"[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." App. 8 at 5)

The panel then held that the state trial judge had met these four *Waller* factors as follows: (1) in considering the prosecutor's request to close the courtroom so that "the child [could] testify in relative calm", the state trial judge "took this to mean the prosecutor was concerned with "the protection of the child" and so complied with the first *Waller* factor

since the state has a "compelling" interest in "the physical and psychological well-being of a minor", citing as authority *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). (App. 8 at 6); (2) the state trial court complied with the second *Waller* factor because he denied the prosecutor's request to close the courtroom during the entire trial, instead closing it totally only during the child's testimony. (App. 8 at 6-7); (3) the state trial court complied with the third *Waller* requirement because he considered other alternatives to excluding Petitioner's immediate family, "including whether to close the courtroom to everybody, including the defendant's family and the victim's advocate." (emphasis original) (App. 8 at 7); and (4) the fourth *Waller* factor was met because the state trial judge took into account the "victim's age", the "psychological maturity and understanding" of the witness, the nature of the crime, and the interests of the victim's relatives. (App. 8 at 7-8).

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the challenged decision of the panel of the Eleventh Circuit in this case is contrary to and rejects the constitutional standards established by this Court for closing a courtroom to the public, including all members of the defendant's immediate family, in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

ARGUMENT

This case presents the question of whether a criminal defendant is entitled to habeas relief because of total closure of his trial in violation of his constitutional right to an open and public trial as defined in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). This Court held that *Waller* violations are not subject to harmless error review. In Petitioner's trial, the courtroom was totally closed during the testimony of the six-year old alleged

victim of sexual abuse by the Petitioner to everyone but the judge, counsel, Petitioner, the jury, the six-year old witness, and an aunt of the witness. Petitioner's family, immediate and otherwise, was specifically excluded over the objection of Petitioner's counsel.

The Florida state trial court made only one finding – that a six-year-old was about to testify in a sex abuse case in which she was the alleged victim. Based on this sole finding, the trial court closed the courtroom to the general public and to all of Petitioner's immediate family during the testimony of the child. This conduct is in direct violation of *Waller* and requires per se reversal because under *Waller* closure of a courtroom during a criminal trial in violation of the Sixth Amendment as construed by *Waller* is a structural error. The automatic closure of the courtroom, including the exclusion of Petitioner's family, solely because a six-year old alleged victim is going to testify to alleged sexual abuse does not meet the *Waller* test. To hold that it does is "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." requiring issuance of a writ of habeas corpus. 28 U.S.C. 2254(d).

Under review is a decision of a panel of the Eleventh Circuit that affirmed the United States District Court for the Middle District of Florida in denying habeas relief. Both courts were interpreting the colloquy among the Florida state trial court, the prosecutor, and the defense counsel set out at length above.

The first *Waller* requirement is that the party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced. (467 U.S. at 48, 104 S.Ct. at 2216). Moreover, under *Waller*, that interest must be truly overriding in the strictest sense to defeat the basic human and

constitutional right to a public trial. The only "interest" advanced by the prosecutor in the instant case was a bald statement that there should be total closure of the courtroom so that the child could testify in "relative calm". No definition was given or requested by the court as to what the prosecutor meant by "relative calm", no information was provided or requested by the court as to how the presence of Petitioner's immediate family would affect the desired, but undefined, "calm", or why the trial court could not enforce "calm" with Petitioner's immediate family in the courtroom. Yet, this statement about "relative calm" is the only thing ever advanced by the prosecution or considered by the trial court. Respectfully, it is meaningless, undefined phrase that cannot serve as a basis for excluding a criminal defendant's family members from the courtroom.

The only "finding" by the trial court was: "...this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs any Sixth Amendment right that he may have to have the members of his family present." (App. 4 at 12) In "this particular instance", there was no evidence in the record that added a single fact, relevant or otherwise, to the mere fact that this was a sexual battery indictment involving a six-year old. Therefore, unless this Court is prepared to have in the Eleventh Circuit a rejection of its holding in *Waller* and a per se rule that where six year olds testify in sexual abuse cases that fact alone justifies total closure, the panel opinion must be reversed.

The panel opinion found that the prosecutor's request should be considered as a concern with the "protection of this child" and found that this alone was sufficient to meet the first prong of the *Waller* test because it was a "'compelling' state interest" in the context of a courtroom closure during a criminal trial involving the forcible rape and forced unnatural rape

of three minors." The panel cited *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982) in support of this proposition. (App. 8 at 6)

Globe Newspaper does not support the Eleventh Circuit panel's ruling in this case. First, the defendant in the *Globe* case was acquitted. Second, the trial court did not exclude the *Globe* defendant's family from the courtroom. Third, the *Globe* case was before the Supreme Court on a First Amendment issue only, not a Sixth Amendment issue, as to the right of the news media to be in future criminal trials in light of a Massachusetts statute that automatically excluded the general public while a minor victim of a sex crime was testifying. Fourth, *Globe* was decided two years before *Waller*. Fifth, *Globe* actually holds that safeguarding the physical and psychological well being of a minor witness in a sex case is a compelling an interest, but "does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." 457 U.S. at 608. In short, *Globe* is clearly not authority for the conclusion of the panel opinion and cannot be reasonably be said to support even the sentence in the opinion for which it is cited as support by the panel.

The second *Waller* prong, the closure must be no broader than is necessary to protect that interest, was clearly violated here. The following colloquy took place between defense counsel and the trial court in which the trial court told the defense counsel that if he was going to exclude the general public, he was going to exclude Petitioner's immediate family: "Trial Counsel: Obviously, I would object only to the – I object to my client's family being excluded. The Court: If I exclude one, I'm excluding everybody." (App. 4 at 11). The trial court refused to even consider the constitutional difference between total and partial closure mandated by *Waller*, equating Petitioner's family with the

general public. Nevertheless, the Eleventh Circuit panel held that the trial court acted properly with regard to the second *Waller* factor by focusing not on who was excluded, but by finding that closing the courtroom only during the "minor-victim's testimony" was the limitation on broadness that *Waller* requires. There is no authority for this proposition. This is an unreasonable interpretation of *Waller* because it means that total closures for limited periods during a trial are beyond *Waller's* reach.

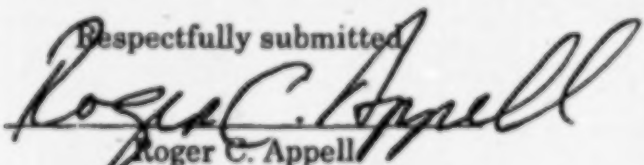
The Eleventh Circuit panel held that the trial court had complied with the third *Waller* factor by considering "other alternatives", but could name no considered alternative other than the court "considering" whether to ban the Petitioner's family members and the little girl's aunt. (App. 8 at 7). With all respect, this Court can examine the colloquy set out above and can find nothing in there where it can be reasonably be said that the trial court ever considered for a moment banning the little girl's aunt. In fact, counsel for Petitioner agreed that the aunt could be in the courtroom so there was no occasion for the court to consider excluding her. But, that aside, how could considering whether to ban the Petitioner's family and the little girl's family and then deciding to ban the Petitioner's family only be considered compliance with the *Waller* factors designed to protect Petitioner's Sixth Amendment rights? The emptiness of this conclusion is characteristic of the panel opinion's overall poverty of thought.

Finally, the panel held that by considering only factors that affected the child witness or her relatives, the trial court complied with the fourth *Waller* factor requiring findings adequate to support the decision to close the courtroom. (App. 8 at 7-8). The trial court made no findings except that a six-year old was about to testify in a sex abuse trial. There was nothing else before the trial court from which to make findings. The remark about the child testifying in "relative

calm" has no *Waller* significance. No one has ever considered, explained, or even mentioned how, since there would be lot of people in the courtroom under the court's closure order, such as the jurors and the judge, who were strangers to the little girl, the presence of a few additional strangers from Petitioner's family would interfere with the "calm" of the child or affect her sensitivity. The trial judge never even suggested that the Petitioner could pick one or two family members to remain in the courtroom with him if some larger number created concerns.

The truth is that the trial judge relied solely on the age of the child and the sexual nature of the charges to completely close the courtroom. That is a clear violation of *Waller*. The Court must reverse the panel decision to maintain the integrity of its own decisions.

Respectfully submitted,



Roger C. Appell
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(205) 252-9462

APPENDIX

APPENDIX 1
1-1
NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

ROGER J. LAPLANTE, Appellant,	) IN THE) DISTRICT) COURT OF
v.	) APPEAL OF) FLORDIA) SECOND DISTRICT
STATE OF FLORIDA, Appellee.	))CASE NO:98-00724)

Opinion filed May 14, 1999.

Appeal from the Circuit Court for Hillsborough County; Chet A. Tharpe, Judge.

Lynn A. Williams, Tallahassee, for Appellant.
Robert A. Butterworth, Attorney General,

Tallahassee, and John M. Klawikofsky,

Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.
Affirmed.

CAMPBELL, A.C J., THREADGILL, J., and LANGFORD, J. DAVID, ASSOCIATE JUDGE, Concur.

APPENDIX 2

2-1

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
JULY 9, 1999

ROGER J. LAPLLANTE, Appellant(s),	)	
V.	)	Case No. 98-00724
STATE OF FLORIDA,	)	

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing and for rehearing en banc in the above styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE OF THE ORIGINAL COURT ORDER.
vl
JAMES BIRKHOLD, CLERK

C: Lynn A. Williams, Esq
John M. Klawikofsky, A.A.G.
Honorable Richard L. Ake

/BL

APPENDIX 3
3-1
FILED
APR 15 AM 10:33

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROGER LAPLANTE,

Petitioner,

v. Case No. 8:O0-CV-2609-T-27TGW

MICHAEL W. MOORE,

Respondent.

_____I

ORDER

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his state conviction for one count of sexual battery on a child less than twelve years of age and one count of lewd and lascivious acts in the presence of a child, for which he was sentenced to life imprisonment. Petitioner supported his petition with a memorandum of law (Doc. 7) and several exhibits (Doc. 2). Respondent filed his response (Doc. 15), which is

supported by numerous exhibits ("Respondent's Exhibits") (Doc. 10), and Petitioner filed a reply (Doc. 16). Having considered the arguments of the parties and reviewed the record, this Court concludes that the best interest of justice would be served by appointing counsel to represent Petitioner in these proceedings.

PROCEDURAL HISTORY

Petitioner was convicted and sentenced in 1997. He timely filed a direct appeal in which he raised four issues. Respondent's Exhibit 2. The conviction and sentence were summarily affirmed in a *per curiam* opinion. Respondent's Exhibit 7. Petitioner then filed a Rule 3.850 motion for post conviction relief in which he raised one claim of ineffective assistance of trial counsel. Respondent's Exhibit 12. At nearly the same time, Petitioner filed a petition for writ of habeas corpus with the state district court of appeal in which he raised one claim of ineffective assistance of appellate counsel. Respondent's Exhibit 15. The Rule 3.850 motion was summarily denied without a response from the state. Respondent's Exhibit 12 at 17- 20. The trial court's denial was affirmed on appeal. The appellate court also summarily denied, in a *per curiam* opinion, the petition for writ of habeas corpus challenging the effectiveness of appellate counsel.

Respondent's Exhibit 14 & 16, respectively. Respondent admits that Petitioner has exhausted his available state court remedies and that he has timely filed the pending federal petition for writ of habeas corpus within the federal limitations period. See Response at 9- 11 (Doc. 15).

DISCUSSION: Denial of a Public Trial

Petitioner asserts two grounds challenging the trial court's decision to clear the courtroom of spectators before the child-victim testified. In Ground One, Petitioner alleges the following: "The trial court erred in clearing the courtroom of all spectators, including the immediate family of the Petitioner, before the alleged child victim was to testify, in violation of the Petitioner's right to a public trial and violating Florida Statutes Section 918.16? In Ground Five, Petitioner alleges the following: "Whether the Petitioner was denied the effective assistance of counsel in that counsel failed to make an adequate objection to clearing of the courtroom by the trial court during the alleged child victim's testimony, and appellate counsel failed to present issue on appeal."

Prior to the commencement of trial, the following exchange occurred between counsel and the

trial judge.

MS. CORCES [prosecutor]: .. . I recognize we have several spectators out here. My concern is that my first witness is going to be the six-year-old girl. And I'm going to ask that sometime after opening the court be cleared.

THE COURT: Okay.

MS CORCES: In order that we have the child testify in relative calm.

THE COURT: You have any objection?

MR. LITTMAN [defense counsel]: No, Your Honor.

Respondent's Exhibit I at 83. Immediately after opening statements and before the child-victim was called as the State's first witness, the following exchange occurred between counsel and the trial judge, initially during a bench conference.

THE COURT: You need to remove the jury while I tell everybody that I'm going to remove the courtroom. I plan on telling everybody because the attorney is requesting that I clear the courtroom.

MS. CORCES: I don't have a problem if the Defense has no objection to— MR. LITTMAN: Obviously, I would object only to the—I object to my client's family being excluded.

THE COURT: If I exclude one, I'm excluding everybody.

MR. LITTMAN: I thought Ms. Corces was only directing it toward the students. Then I don't join in the application. I think it would deny him of his Sixth Amendment right.

THE COURT: I don't think he has a right to have have [sic] all the family members during the testimony of the child victim in a sexual battery case. He has a right to be present, but I don't think he has a right to have all of his family members present during that testimony. So I'm going to clear the courtroom.
My only concern is do you want me to remove the jury and then tell every one I'm clearing the courtroom or do you want me to do it now in front of the jury?

MR. LITTMAN: No, I would ask you to excuse the jury.

MS. CORCES: If I may, Judge, I believe it is permissible to have a victim's advocate or someone on behalf of the victim to be present.

THE COURT: That's true and that's going to happen.

MR. LITTMAN: And, Judge, that's again—that's our basis for requesting that although, again, we're not raising any complaint to members of the general public other that [sic] the members of LaPlante's family. His mother, father, two sisters and a brother are currently present. I ask that they be allowed to stay throughout the entire process since they are not witnesses.

THE COURT: Okay. Take the jury out, please.
(jury taken out at 10:45)

Ladies and Gentlemen, there's been a request by the attorneys that because of the young age of the child, they don't want members of the public present.

And I'm going to respect that request. So at this time I'm going to direct the bailiffs to clear the courtroom, please.

MS. CORCES: This is Kathy Shuck. This is the aunt of A.S.[1]

THE COURT: Okay.

MR. LITTMAN: Judge, again, with the greatest respect to the Court and my advisory [sic], now that the public has been excluded, while I certainly have no objection to Ms. Shuck being present as a victim advocate since she's acting in that capacity, not as a witness. Am I correct? She's not a witness.

MS. CORCES: No, she's not.

MR. LITTMAN: Judge, I have to request on behalf of my client, I have to object, to his mother, father, two sisters and a brother being excluded since they are all adults. There's no reason to believe that they would disrupt the Court. I can understand certainly students, a class of students being here or general members of the public.

But I think that relatives and close friends of the defendant, certainly, family, I think raises a Sixth Amendment right to a public trial. And I wanted to raise that I object, most respectfully, so in case there is a conviction, we would have that reserved.

1 The child-victim's initials are used instead of her true name to protect her identity.

THE COURT: All right. I disagree with you in the fact that this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs any Sixth

Amendment right that he may have to have the members of his family present.

I would wholeheartedly agree with you, sir, that if I cleared the courtroom of everyone including him, that that would be a problem. But he's allowed to stay. And I think the child has a right to have a child's advocate, a victim's advocate present. And every one else has been excluded.

And I think that the case law is clear on that, that the protection of this child will at this point outweigh the rights of the defendant to have members of his family present during the testimony of this child in areas that are going to be extremely sensitive to the child and possibly traumatic.

So I understand your objection, sir, and I'm overruling it. Call your first witness.

Respondent's Exhibit I at 101 - 105. On direct appeal, Petitioner challenged the trial court's exclusion of all members of the public, including the defendant's family members. Respondent's Exhibit 2 at 19. The State argued that the issue was not properly preserved because defense counsel had agreed to the exclusion of the members of the public, Respondent's Exhibit 3 at 3-4, and also that the trial court had provided sufficient reasons for clearing the courtroom and defense counsel had failed to object to those findings. *Id.* at 4 - 5. The appellate court affirmed in a *per curiam* opinion. Respondent's Exhibit 7.

Thereafter, in his Rule 3.850 motion for post

conviction relief, Petitioner alleged that counsel was ineffective for agreeing to the exclusion of the general public and only preserving an objection to the exclusion of his family members. After recognizing the proper legal standard for proving ineffective assistance of counsel, the trial judge rejected this claim *sua sponte*, stating:

> Defendant alleges that trial counsel was ineffective for failing to make an adequate objection to the clearing of the courtroom by the trial court during the alleged victim's testimony. He claims that counsel objected only to the exclusion of Defendant's family, and agreed to the exclusion of members of the general public. Defendant further asserts that if an adequate objection had been made his appeal would have been successful and a new trial ordered.
>
> However, except for changes in decisional law rendered subsequent to final appeal, matters which could have or should have been raised on direct appeal may not be considered by a rule 3.850 motion for post-conviction relief. . . . In his Motion, Defendant acknowledges that the issue he has raised in his post-conviction pleading was previously raised on direct appeal. Therefore, this issue is foreclosed from consideration under post-conviction relief.
>
> Even assuming that this issue was properly before this Court, Defendant has failed to adequately illustrate how counsel's failure to object to the exclusion of members of the general public while the victim testified would have affected the outcome of the proceedings. Defendant has failed to satisfy the

Strickland test and is therefore not entitled to relief. Respondent's Exhibit 12 at 18- 19 (citations omitted). The appellate court then affirmed in a *per curiam* opinion. Respondent's Exhibit 14.

Thus, Petitioner's claim of denial of his right to a public trial is before this Court based on two *per curiam* opinions from the state appellate court and one *sua sponte* opinion from the trial court in denying the Rule 3.850 motion. None of these decisions contain any findings of fact entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). Moreover, Respondent's response lacks adequate analysis of these issues. *See, e.g., Wailer v. Georgia,* 467 U.S. 39 (1984), *Douglas v. Wainwright,* 739 F.2d 531 (11th Cir. 1984), *cert. denied,* 469 U.S. 1208 (1985), and *Judd v. Haley,* 250 F.3d 1308 (11th Cir. 2001).

Accordingly, the Federal Public Defender is hereby APPOINTED to represent Petitioner in these proceedings. The Clerk shall send a copy of this Order to the Federal Public Defender's Office, attention Don Horrox, and a copy of the petition forwrit of habeas corpus, the supporting memorandum and appendix (Doc. 1, 2 & 7), the State's response

(Doc. 15), and Petitioner's reply (Doc. 16). Counsel for Respondent shall provide to Counsel for Petitioner a copy of Respondent's Exhibits (Doc. 10) within eleven (11) days and file an appropriate certificate of service at that time. Further, the response (Doc. 15) is hereby STRICKEN, although it will be retained in the file. Respondent shall file a new response within thirty (30) days. Petitioner will then have twenty (20) days in which to file a reply. Both parties shall address in their respective documents whether this action meets the statutory requirements for conducting an evidentiary hearing. The Court does not intend to extend these deadlines absent compelling circumstances.

ORDERED in Tampa, Florida, on April 15, 2003.

James D. Whittemore
UNITED STATES DISTRICT JUDGE

SA/ro

APPENDIX 4
4-1
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROGER LAPLANTE,

Petitioner

v.

JAMES CROSBY,

Respondent,

Case No. 8:OO-CV-2609-T-27 TGW

ORDER

Before the Court is a *pro* se petition for writ of habeas corpus filed by an inmate in a Florida penal institution pursuant to 28 U.S.C. § 2254 challenging a sentence entered by the Thirteenth Judicial Circuit Court, Hilisborough County, Florida. Petitioner's challenge relates to his 1997 conviction for one count of sexual battery on a child less than twelve years of age and one count of lewd and lascivious acts in the presence of a child, for which he was sentenced to life imprisonment. Respondent filed a response to the Petition (Dkt. 15), and Petitioner filed a reply to the response (Dkt. 16).

The Federal Public Defender was appointed to represent Petitioner in these proceedings to assist him in filing a supplemental reply (Dkt. 17). The supplemental reply was filed (Dkt. 24), and Respondent filed a supplemental response

(Dkt. 21). The matter is now before the Court for consideration on the merits.

Having reviewed the record, the arguments presented by the parties in their briefs, and applicable statutes and controlling case law, the Court finds that Petitioner has not established that he is entitled to federal habeas relief.[1]

Petitioner was charged by information with one count of sexual battery on a child less than twelve years of age and one count of lewd and lascivious acts in the presence of a child (Dkt. 10, Ex. 001, Vol. I at 10-11). At the time of trial, the child victim was six years old. At trial, Petitioner was represented by the public defender. The jury returned a guilty verdict as to both charges (Dkt. 101 Ex. 001, Vol. I at 82). Petitioner was sentenced on Count 1 to life imprisonment, and on Count 2 to a concurrent term of 35 months (Dkt. 10, Ex. 001, Vol.1 at 91-100).

Represented by the public defender (Dkt. 10, Ex. 001, Vol. I at 109), Petitioner filed a direct appeal asserting four issues:

1. The trial court erred in clearing the courtroom of all spectators, including the immediate family of the defendant, before the child who was the alleged victim testified, in violation of the defendant's right to a public trial.

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[1] The court has reviewed the record and concludes that Petitioner is not entitled to an evidentiary hearing, as the pertinent facts are rutty developed in the record. See *Smithy. Singletary*, 170 F3.d 1051, 1053-54 *(11th cir.* 1999). See *Cave v. Singletaiy*, 971 F.2d 1513, 1516 (11th dir. 1992); *High v. Head*, 209 F.3d 1257,1263 (11Th dr. 2000), cert. *denied*, 532 U.S. 909 (2001) (citing *MCCleskey v. Zant*, 499 U.S. 467, 494 (1991)).

2. The trial court erred in restricting the defense from impeaching the victim's testimony via use of evidence and cross-examination about the fact that the victim had three relatives — her father and a half-brother, who were child molesters, and a grandfather who had been seen undressed in the victim's presence in the past -- who could have exposed her to sexually inappropriate behavior thus explaining a source of her sexual knowledge other than the alleged offense at trial.

3. The trial court erred in denying a motion for judgment of acquittal since the state failed to present proof identifying the LaPlante as the perpetrator of the crimes charged.

4. The trial court erred in denying the motion to suppress statements obtained from LaPlante without a knowing and intelligent waiver of his rights under *Miranda*.[2]

Dkt. 10, Ex. 002 at I. The convictions and sentences were affirmed in a per curiam opinion on May 14, 1999, and an order denying Petitioners motion to withdraw the mandate was entered on July 9, 1999. *See LaPlante v. State*, 736 So.2d 1190 (Fla. 1999) (Table).

Petitioner filed an application for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 on March 1, 2000, raising one claim of ineffective

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[2] *Miranda v. Arizona*, 384 U.S. 438 (1966).

assistance of trial counsel:

> Defense counsel's failure to make an appropriate objection to [removal of the general public from the courtroom while the child testified resulted In] the defendant being deprived of his sixth amendment right to a public trial and the consequent waiver of the defendant's right to appeal that error.

(Dkt. 10, Ex. 012 at R. 5). The Rule 3.850 motion was summarily denied on October11, 2000 (Dkt. 10, .Ex. 012 at R. 17-20). The trial court's denial was affirmed on appeal. *LaPlante v. State,* 829 So.2d 216 (Fla. 2d DCA 2000).

On May 24, 2000, Petitioner filed a petition in state court seeking a writ of habeas corpus raising one claim of ineffective assistance of appellate counsel: failure to bring the decision in *Williams v. State,* 736 So.2d 699 (Fla. 4th OCA 1999), to the attention of the appellate court as supplemental authority in support of the pending appeal (Dkt. 10, Ex. 015). The appellate court summarily denied the petition for writ of habeas corpus (Dkt. 10, Exs. 014 & 16, respectively).

Respondent contends that the instant petition for writ of habeas corpus was not filed within the federal limitations period (Dkt. 15 at 9). Contrary to Respondent's contention, the instant Petition was timely filed within the one-year limitations period. *See* 28 U.S.C. §2244(d). Respondent's argument fails to exclude the 90 day period within which a defendant may petition the United States Supreme Court for a writ of certiorari in calculating the number of days which elapsed from Petitioner's conviction until he filed his federal habeas petition. *See Bond v. Moore,* 309 F.3d 770 (11th Cir. 2002) (the limitations period does not begin town until the 90-day window during which the petitioner could have

petitioned the United States Supreme Court for a writ of *certiorari* expired). See *also* Sup. Ct. R. 13.1 (~A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), signed into law on April 24, 1996, amended the statutes governing federal habeas relief for state prisoners. Because Petitioner filed his petition after April 24, 1996, the AEDPA provisions apply. See *Wilcox v. Florida Dep't of Corrections*, 158 F.3d 1209, 1210(11th Cir. 1998), *cert.. denied*, 531 U.S. 840(2000). Where a state court initially considers the issues raised in the petition and enters a decision on the merits, 28 U.S.C. § 2254(d) governs the review of those claims. *See Mobley V. Head*, 267 F.3d 1312, 1316 (11th Cir. 2001), cert. *denied*, 536 U.S. 968 (2002) (finding that the court must deny the writ unless one of two § 2254(d) exceptions applies).

Section § 2254 creates a deferential standard for federal court review of state court adjudications. In pertinent part, § 2254(d) states:

An application for a writ of habeas corpus on behalf of a person In custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or

> involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Eleventh Circuit Interpreted the new standard in *Putman v. Head*:

> The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state courts decisions. See *Williams v. Taylor,* 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). A state court decision Is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case. See *Bottoson v. Moore,* 234 F.3d 526, 531 (11th Cir. 2000).
>
> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioners case, See *Id.* An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. *See Id.* Notably, an "unreasonable application" is an "objectively unreasonable"

application. See *Williams*, 529 U.S. at 412, 120 S.Ct. at 1523.

Lastly, § 2254(d)(1) provides a measuring stick for federal habeas courts reviewing state court decisions. That measuring stick is "clearly established Federal law." 28 U.S.C. § 2254(d). Clearly established federal law is *not* the case law of the lower federal courts, including this Court. Instead, in the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. at 1523.

268 F. 3d 1223, 1241 (11th Cir. 2001) (footnotes omitted).

Because the state court initially considered the issues raised in the instant petition and entered a decision on the merits, § 2254(d) governs the review of Petitioner's claims. See *Mobley*, 267 F.3d at 1316. A petitioner has the burden of overcoming all state court factual determinations by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Discussion

In his petition for federal habeas relief, Petitioner raises the following claims:

1. The trial court erred in clearing the courtroom of all spectators, including the

immediate family of the petitioner, before the alleged child victim was to testify, in violation of the Petitioners right to a public trial and violating Florida statutes section 918.16.

2. The trial court erred in restricting the Petitioner from Impeaching the victim's testimony via use of evidence and cross examination about the fact the alleged victim had three (3) relatives, her father, half brother and grandfather who were child molesters. The grandfather who had been seen undressed In the alleged victim's presence in the past, who could have exposed her to sexual inappropriate behavior thus explaining a source of her sexual knowledge other than the alleged offense(s) at trial.

3. The trial court erred In denying a motion for judgment of acquittal since the state failed to present proof of identifying Petitioner LaPlante as the perpetrator of the offense(s).

4. The trial court erred in denying the motion to suppress statements obtained from Petitioner LaPlante without a knowing and intelligent waiver of his rights under Miranda.

5. In this claim, Petitioner asserts that he was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to make an adequate objection to clearing of the courtroom by the trial court during the alleged child victim's testimony, and appellate counsel failed to present issue on appeal.

The claims raised in Grounds One through Four were raised by Petitioner on direct appeal and rejected. See *LaP/ante v. State*, 736 So.2d 1190 (FIa. 1999) (Table). Although the appellate court issued its decision without written opinion, the Eleventh Circuit has held that a state court's summary rejection of a federal constitutional issue qualifies as an adjudication on the merits under § 2254(d) so that the summary rejection is entitled to the same deference as a written opinion. *Wright v.* Sec. of *Dept.* Of Corn, .278 F.3d 1245, 1254 (11th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003).

As to the allegations in Ground Five that trial counsel was ineffective for failing to raise the Issue asserted in Ground One, this claim was raised in Petitioner's Rule 3.850 motion and rejected in a written opinion entered April 13, 2000. The appellate court affirmed the trial court's decision. Petitioner raised his claim of ineffective assistance of appellate counsel In the state habeas petition he filed on May 24,2000 (Dkt. 10, Ex. 015).

Because these claims were raised in state court and rejected, the writ must be denied unless one of the two § 2254(d) exceptions applies. See *Mobley*, 267 F.3d at 1316. Having reviewed the record, the arguments presented by the parties in their briefs, applicable statutes, and controlling case law, the Court finds that Petitioner has not met his burden in this regard.

Ground One

Petitioner asserts that the trial court erred when it ordered his family removed from the courtroom during the victim's testimony. At the time of Petitioner's trial, Fla. Stat. § 918.16 provided:

> In the trial of any case, civil or criminal, when any person under the age of 16 or any person with mental retardation as defined in s. 393.063(41) Is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters! court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney's office.

Fla. Stat § 918.16 (1997).

Petitioner relies on *Prichett v.* State, 566 So.2d 6 (Fla. 2d OCA 1990) in support of this claim. In *Prichett,*[3] the court held that where the trial court failed to make *any* findings to justify closure of the trial, application of § 915.16 abridged the defendant's right to a public trial. *Id.* at 7.

The Sixth Amendment is the origin of an accused's "right to a speedy and public trial." U.S. Const. amend. VI. See *also In* iv *Oilver,* 333 U.S. 257, 270 *(1948); Judd v. Haley,* 250 F.3d 1308, 1314 (11th Cir. 2001). The constitutional right to a public trial is grounded in the belief that "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings,' *Waller v. Georgia,* 467 U.S. 39,46 n. 4(1984) (quoting Estes *v. Texas,* 381 U.S. 532, 588 (1965) (Harlan, J., concurring)).

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[3] Contrary to Petitioner's assertion (Dkt. 24 at 5), this Court did not address *Pritchett* in its April 15, 2003 Order appointing the Federal Public Defender to represent Petitioner.

While there Is a presumption In favor of open trials, *see Wailer,* 467 U.S. at 45; *Richmond Newspapers, Inc.,* V. *Virginia,* 448 U.S. 555, 573 (1980), the right is not absolute. Trial judges have discretion to Impose reasonable limitations on access to a trial when overriding interests. . . are likely to go unprotected if closure is not employed.

Waller, 467 U.S. at 45; see *also Bell v. EvatI,* 72 F.3d 421, 433 (4th Cir. 1995). The Supreme Court has held:

> [t]he presumption of openness may be overcome only by an overriding Interest based on findings that closure Is essential to preserve higher values and is narrowly tailored to serve that Interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. *v. Superior Court,* 464 U.S. 501, 510 (1984), Applying these principles in the context of a defendant's Sixth Amendment challenge to the closure of a courtroom proceeding, the Supreme Court held that the right to a public trial may give way if:

(1) the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced;

(2) the closure is no broader than necessary to protect that interest;

(3) reasonable alternatives to closing the proceeding are considered by the trial court; and

(4) findings adequate to support the closure are made by the trial court.

See Waller, 467 U.S. at 48.

"[E)ven when a right of access attaches, It is not absolute." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) A rule of mandatory closure when a minor sex victim testifies Is not necessarily considered constitutionally infirm. *Id.* at 9 n.2 (recognizing that "[t]he protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding") (citation omitted).

In *Globe Newspaper* Co. *v. Superior* Court *for Norfolk County*, the court recognized that the State's interest in protecting the "physical and psychological well-being of a minor-- is a compelling one," but found that "the circumstances of the particular case may affect the significance of the interest." 457 U.S. 596, 607-08 (1982). While the *Globe* court found that neither the State's interest In protecting minor victims of sex crimes from trauma and embarrassment nor its interest in encouraging such victims to come forward and testify In a truthful and credible manner warrant "mandatory closure of a trial, it identified certain factors to be considered "on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608.

Petitioner's argument that his right to due process was violated when the trial court ordered that the courtroom be cleared while the child victim testified has no merit. A review of the transcript confirms that Petitioner had notice that the prosecution would be requesting the that the court to clear the courtroom and that he had a meaningful

opportunity to be heard on the issue:

Prosecutor: ... I recognize we have several spectators out here. My concern Is that my first witness Is going to be the six-year-old girl. And I'm going to ask that sometime after opening the court be cleared.

Court: Okay.

Prosecutor: In order that we have the child testify in relative calm.

Court: You have any objection?

Trial Counsel: No, Your Honor.

Dkt. 10, Ex. 001, Vol. II at 83. After opening statements, the following exchange occurred between counsel and the trial judge, Initially during a bench conference.

Court: You need to remove the jury while I tell everybody that I'm going to remove the courtroom. I plan on telling everybody because the attorney is requesting that I clear the courtroom.

Prosecutor: I don't have a problem if the Defense has no objection to --

Trial Counsel: Obviously, I would object only to the -- I object to my client's family being excluded.

Court: If I exclude one, I'm excluding everybody.

Trial Counsel: I thought Ms. Corces was only directing It toward the students. Then I don't join in the application. I think it would deny him of his Sixth Amendment right.

Court: I don't think he has a right to have [sic] all the family members during the testimony of the child victim in a sexual battery case. He has a sight to be present, but I don't think he has a right to have all of his family members present during that testimony. So I'm going to clear the courtroom.

My only concern is do you want me to remove the jury and then tell every one I'm clearing the courtroom or do you want me to do it now in front of the jury?

Trial Counsel: No, I would ask you to excuse the jury.

Prosecutor: if I may, Judge, I believe it is permissible to have a victim's advocate or someone on behalf of the victim to be present.

Court: That's true and that's going to happen.

Trial Counsel: And, Judge, that's again—that's our basis for requesting that although,

again, we're not raising any complaint to members of the general public other that [sic] the members of LaPlante's family. His mother, father, two sisters and a brother are currently present. I ask that they be allowed to stay throughout the entire process since they are not witnesses.

Court: Okay. Take the jury out, please.
(Jury taken out at 10:45)

Ladies and Gentlemen, there's been a request by the attorneys that because of the young age of the child, they don't want members of the public present. And I'm going to respect that request. So at this time I'm going to direct the bailiffs to clear the courtroom, please.

Prosecutor: This Is Kathy Shuck. This is the aunt of A.S.

Court: Okay.

Trial Counsel: Judge, again, with the greatest respect to the Court and my advisory [sic], now that the public has been excluded, while I certainly have no objection to Ms. Shuck being present as a victim advocate since she's acting in that capacity, not as a witness. Am I correct? She's not a witness.

Prosecutor: No, she's not.

Trial Counsel: Judge, I have to request on behalf of my client, I have to object, to his mother, father, two sisters and a

brother being excluded since they are all adults. There's no reason to believe that they would disrupt the Court. I can understand certainly students, a class of students being here or general members of the public.

But I think that relatives and close friends of the defendant, certainly, family, I think raises a Sixth Amendment right to a public trial. And I wanted to raise that I object, most respectfully, so in case there is a conviction, we would have that reserved.

Court: All right. I disagree with you in the fact that this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs

any Sixth Amendment right that he may have to have the members of his family present.

I would wholeheartedly agree with you, sir, that if I cleared the courtroom of every one including him, that that would be a problem. But he's allowed to stay. And I think the child has a right to have a child's advocate, a victim's advocate present. And every one else has been excluded.

And I think that the case law is clear on that, that the protection of this

child will at this point outweigh the rights of the defendant to have members of his family present during the testimony of this child in areas that are going to be extremely sensitive to the child and possibly traumatic.

So I understand your objection, sir, and I'm overruling it. Call your first witness.

Dkt. 10, Ex. 001, Vol. II at 101 -105.

The reason for the prosecutors request to exclude the public is apparent. She intended to introduce the testimony of the six-year-old victim regarding her contact with the Petitioner, the man alleged to have sexually battered her. The trial court, pursuant to Fla. Stat. §918.16, and without objection from defense counsel, excluded the general public from the trial during the child victim's testimony. Over objection, members of Petitioners immediate family were excluded as well. The trial court determined that the interests of the victim outweighed the rights of Petitioner to have members of his family present in the courtroom during the victim's testimony. *See* Dkt. 10, Ex. 001, Vol. I at Tr. 101-05.

THE COURT: All right. I disagree with you in the fact that this is a case involving a sexual battery of a six-year-old. And I think that in this particular instance the protection of this child outweighs any Sixth Amendment right that he may have to have members of his family present.
And I think that the case law Is clear on that, that the protection of the child will at this point

> outweigh the rights of the defendant To have members of his family present during the testimony of this child in areas that are going to be extremely sensitive to the Child and possibly traumatic.

(Dkt. 10, Ex. 001, Vol.1 atTr.104-105)

Petitioner has not established that the trial court's decision to close the courtroom during the child victim's testimony was contrary to or an unreasonable application of the Supreme Court holding in *Wailer,*[4] and its progeny. The trial court made sufficient factual findings to enable a review of whether the decision to close the trial was appropriate and no broader than necessary to protect the child's interest, considering Supreme Court precedent. Those findings addressed the child's tender age, the sensitive and potentially traumatic nature of her expected testimony and the necessity of protecting her interests over the Sixth Amendment rights of Petitioner The court appropriately weighed the competing interests, considered the manner in which the competing interests could best be served and found that the state had an overriding interest in the victim's welfare which outweighed Petitioner's Sixth Amendment right to a public trial. Petitioner has failed to demonstrate by clear and convincing evidence that the state court's decision was contrary to or an unreasonable

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[4] In its April 15, 2003 Order, this Court observed that none of the state court decisions rejecting this claim contain any findings of fact entitled to a presumption of correctness pursuant to28 U.S.C. § 2254(e)(1). Upon closer examination of the transcript of the proceedings in tight of the *Waller* four-prong test, this Court recedes from that observation and finds that the court articulated sufficient findings In support of its decision to close the trial during the victim's testimony.

application of clearly established Supreme Court law or an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. 2254(d). Accordingly, Petitioner has not established that he is entitled to relief on this claim.

Ground Two

In this claim, Petitioner asserts that the trial court erred in restricting his ability to impeach the victim's testimony with "evidence and cross examination" about three male relatives. In this claim, Petitioner raises a state law evidentiary issue which provides no basis for federal constitutional habeas corpus relief.[5] See *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (per curiam). Federal habeas relief is available only where a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254 (a).

> A federal habeas petition may be entertained only on the ground that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). A state's interpretation of its own laws or

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[5] Petitioner asserts that he was deprived of his right to due process of law and a fair trial as well as his right to confront and cross examine witnesses because he was not allowed to question the victim regarding her three male relatives. The victim repeatedly maintained that no one other than Petitioner had attempted to have sexual contact with her. When queried, Petitioner was unable to articulate a basis for suspecting any of the three men of having had contact of a sexual nature with the victim. Moreover, Petitioner was able to place the information regarding her family before the jury through the testimony of the victim's maternal grandmother.

> rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved. *Bronstein v. Walnwright*, 646 F.2d 1046, 1050 (5th Cir. Unit B June 1981). State courts are the ultimate expositors of their own state's laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of the state except in extreme cases. *Mendiola v. Estelle*, 635 F.2d 487, 489 (5th Cir. Unit A 1981).

McCullough v. Singletaryy, 967 F.2d 530, 535-36 (11th Cir. 1992), cad. *denied*, 507 U.S. 75(1993). This limitation on federal habeas review is equally applicable when a petition involves a state law issue which is "couched in terms of equal protection and due process." *Branan*, 861 F.2d at 1508.

Federal courts in habeas corpus proceedings do not sit to review state evkientiary questions unless the alleged error is of such magnitude as to render the defendant's state court trial fundamentally unfair. *See Esteile v. McGuire*, 502 U.S. 62, 72(1991); *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983) (citation omitted); *Jameson v. Wainwright*, 719 F.2d 1125, 1127(11th Cir. 1983); *DeBenedictis v. Wainwright, 674* F.2d841, 843 (11th Cir. 1982). In general, federal courts are reluctant to second-guess state evidentiary rulings, recognizing that states deserve wide latitude in that area, *see Maness v. Wainwright*, 512 F.2d 88, 92(5th Cir. 1975),[6] *cert. dismissed*, 430 U.S. 550(1977), so that

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[6] Fifth circuit decisions handed down prior to October 1, 1981, are binding precedent upon this Court. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th dr. 1981) (en banc).

federal habeas corpus relief is rarely deemed appropriate for claims predicated on allegations of state evidentiary error. See *Boykins v. Wain wright,* 737 F.2d 1539, 1543-44 (11th Cir. 1984), *cert. denied,* 470 U.S. 1059 (1985). If the evidence at issue was not material enough to be considered crucial, critical, or a highly significant factor so as to deny the petitioner a fundamentally fair trial, habeas corpus relief should be denied. *See* Jameson, 719 F.2d at 1127; *Ha//v. Wainwright,* 733 F.2d 766, 770(11th Cit. 1984), *cert. denied,471* U.S. 1111-(1985).

Petitioner has not shown that the trial court's evidentiary rulings at Issue in this claim denied him a fundamentally fair trial. The victim was born In January 1991. The victim's natural father was charged with sexually molesting his 15 year old sister-in-law in February 1992. At that time, the victim, barely a year old, was removed from the home. The father was subsequently convicted of the crime and placed on probation.

The victim's maternal grandmother testified that the victim's half-brother had inappropriate sexual contact with one of the victim's sisters. The victim had not lived In the same house with her half-brother since she was removed from the family home in 1992, and although testimony established that for three weeks at some time between July 1996 and January 1997, the half-brother lived in a bus parked near the house in which the victim lived, there was no testimony that he ever had any Inappropriate contact with the victim.

Petitioner and the child's paternal grandmother, Petitioners girlfriend, were prepared to testify that on two occasions, they had discovered her husband, the victim's grandfather, in the same room with the victim while partially disrobed. The grandfather was observed seated in a chair on one

occasion and on the other occasion he was witnessed lying on a bed in the same room with the victim. There was no allegation that any inappropriate contact was ever observed between the grandfather and the victim.

Prior to trial, the State moved to instruct Petitioner that he could not make reference to these individuals he suspected of having sexual contact with the victim because there was no evidence that any of these men had behaved inappropriately with the victim and she had denied that anyone other than Petitioner had ever touched her in that manner. Petitioner argued that he wanted to use this information to "impeach" the child's credibility.

Petitioner's theory of defense was that he had been caught up in a family custody battle, with the victim's maternal grandparents using the allegations of child abuse in an attempt to prevent custody of the child from being returned to the paternal grandmother who, until she left her husband and took up residence with Petitioner, had custody of the victim. Petitioner asserted that the victim was never actually molested. However, Petitioner also wanted to argue that if the victim was acting out sexually, there were other males who had contact with her who could have exposed her to sexually inappropriate behavior.

The trial court found that the state's motion to preclude opinion evidence and collateral crime evidence by third parties should be granted, stating: "I'm going to grant that motion. Finding specifically that the incidents involving the father are too remote in time. That it's not relevant and it will cause this jury to speculate. And that it's not relevant. And that would be as to both." The following exchange then took place:

Counsel: Judge, along those lines, we just heard testimony from Phyllis

Bogle that during the latter half of '96 and '97, perhaps at this current time, that BJ is living on a bus right outside the residence on the same piece of property with the complainant A.S. That's a fact that we didn't know this morning when we made the argument.

I had believed that was true, but now we have confirmation of that. So that certainly cannot be said to be remote in time if he's living in the same domicile.

Court: With regard to the father, I don't think there's any question. Definitely remote. You don't have any evidence whatsoever, There are no allegations, you have no evidence that they were left alone together, that there was any type of inappropriate conduct between the two. And it's gong to cause this jury — you're going to place something into evidence that's going to cause them to speculate. And I'm not going to allow it in.

Prosecutor: Judge, with regard to the allegation concerning seeing Mr. James Saunders with his pants down white in the presence of the child, and also with regard to any opinion evidence to be offered by any witnesses as to

who may have done this, what's the Court's ruling with regards

Court: I'm not allowing that in. Either of those. Dkt.10, Ex. 001, Vol.11 at 76-77.

For the reasons expressed by the state trial judge, the Judge's decision to prevent cross-examination of the six-year-old victim regarding her half-brother, father, and paternal grandfather did not render Petitioners trial fundamentally unfair. Petitioner has not overcome the presumption of correctness accorded trial court findings of fact pursuant to 28 U.S.C. § 2254(e). Petitioner has not established, therefore, that the state courts resolution of this claim was contrary to or an unreasonable application of federal law or an unreasonable application of the law to the facts. See 28 U.S.C. § 2254(d). *See also VanPoyck v. Florida Dept of Corrs.*, 290 F.3d 1318, 1330 n.13 (11th Cir. 2002); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001); *Venson v. State of Ga.*, 74 F.3d 1140 (11th Cir.1996). Petitioner is not entitled to relief on this claim.

Ground Three

In this claim, Petitioner challenges the sufficiency of the evidence identifying him as the perpetrator. Specifically, Petitioner asserts that "the trial court erred In denying a motion for judgment of acquittal since the state failed to present proof of identifying Petitioner LaPlante as the perpetrator of the offense(s)." To resolve this claim, the court reviewed the trial transcripts. Notwithstanding that the victim did not physically identify Petitioner during trial as the perpetrator, Petitioner's argument that the evidence of identification was insufficient is

unpersuasive.

To satisfy the constitutional requirement of due process in a criminal trial, the state must prove beyond a reasonable doubt every fact that constitutes an essential element of the crime charged against the defendant. *In re Winship*, 397 U.S. 358,364(1970). When considering the sufficiency of the evidence on review, the inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt but whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson *v. Virginia*, 443 U.S. 307, 319 (1979) (citation omitted); *see also United* States *v. Thomas*, 987 F.2d 697 (1993); *Bishop v. Kelso*, 914 F.2d 1468, 1470 (11th Cir. 1990). Moreover, the court may not reweigh the evidence. *Jackson*, 443 U.S. at 319.

At trial, the victim testified that at the time of the sexual contact, she lived with her paternal grandmother, Norma, and Petitioner, who she knew by the nickname "Roger Rabbit" (Dkt. 10, Ex. 001, Vol. II at Tr 110). According to the victim, she did not know any person named Roger other than the person she called Roger Rabbit (Dkt. 10. Ex. 001, Vol. II at Tr 122-123). In describing the nature of the sexual contact, the victim Identified Petitioner by name as the perpetrator, although she did not actually identify Petitioner in the courtroom (Dkt, 10, Ex. 001, Vol. II at Tr 113-119). When asked to identify the person she was describing, the victim actually pointed toward the jury (Dkt. 10, Ex 001, Vol. I at Tr 111). The trial court determined that when the child denied knowing anyone sifting at the defense table, she did so out of fear and denied a defense motion for dismissal based on no identification (Dkt. *10*, Ex. 001, Vol. II at Tr 145). Subsequently, both of the victim's grandmothers

testified that Petitioner's nickname was Roger Rabbit and Identified him as "Grandma Norma's' boyfriend (Dkt. 10, Ex. 001, Vol. II at Tr. 150; 152). Mrs. Bogle identified Petitioner in the courtroom (Dkt. 10, Ex. 001, Vol. II at Tr. 150;152).

Furthermore, the victim's testimony was corroborated in part by Petitioner's statements. The prosecution introduced incriminating statements in which Petitioner denied touching the victim's vagina, but admitted to having had inappropriate contact with her. Petitioner stated that while he was alone with the victim, she turned on the television set and a pornographic video tape which had been left inside the video player began to play. According to Petitioner, the victim pulled down his bathing suit and he masturbated (Dkt. 10, Ex. 001, Vol. II at Tr 218). While Petitioner admitted his penis may have touched the victim's thigh near her vagina, he stated that he did not think his penis ever actually touched her vagina. According to Petitioner, he tried to stand, and the victim wrapped her legs around him. Petitioner admitted that his penis may have touched the victim's thigh area again, but he never got on top of [mounted] the little girl. In his statement, Petitioner complained "[what really pisses me off is that she's the one who wanted to do this and I didn't, and now I'm getting In trouble" (Dkt. 10, Ex. 001, Vol. II at 1364).

Viewing the evidence in the light most favorable to the prosecution, the jury, as a rational trier of fact, could have found the essential elements of the crime, including Petitioner's identification, to have been proven beyond a reasonable doubt.

Applying the standards required by § 2254(d), Petitioner has not rebutted the presumption of correctness accorded the trial court's factual findings. The trial court's decision denying Petitioner's Rule 3.850 motion cannot be said to have "resulted In a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or an unreasonable application of the law to the facts. 28 U.S.C. § 2254(d)(i).

Ground Four

Petitioner asserts that the trial court erred In denying his motion to suppress statements obtained from him without a knowing and intelligent waiver of his rights under Miranda.[7] Petitioner appeared at the investigating officer's office on April 30, 1997, to take a polygraph examination (Dkt, 10, Ex. 001, Vol. IV at 359).8 Following the polygraph test, Petitioner gave a statement to the officers (Dkt. 10, Ex. 001, Vol. IV at 362-65; 373-75).[8] Petitioner filed a motion to suppress the statement on grounds that he was not read or orally advised of his *Miranda* rights.

The record confirms that Petitioner was afforded a full and fair opportunity to develop the factual basis for this claim before the state trial court (Dkt. 10, Ex. 001, Vol. IV, 356-90). During the hearing, Petitioner asserted that although he signed the form advising him of his *Miranda* rights, he did not actually read the form in Its entirety before signing it (Dkt. 10,

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[7] Established in *Miranda v. Arizona*, 384 U.S. 436 (1966). the Fifth Amendment right to counsel Is Intended to operate prophylactically to protect a defendant from making self-incriminating statements during his arrest or interrogation that might be used against him in the course of subsequent legal proceedings. *Id.* at 478-79.

[8] According to the officer who administered the test, the results of the polygraph test Indicated that Petitioner may *have* answered several questions untruthfully (Dkt. 10, Ex. 001, Vol. IV at 373).

Ex. 001, Vol. IV at 380-81). The investigating officer who gave the forms to Petitioner testified that he did not recite the *Miranda* warnings to Petitioner because having determined that Petitioner had a Ph.D. in physics from MIT, he felt that Petitioner would not have any trouble understanding the written form (Dkt. 10, Ex. 001, Vol. IV at 370-71). He also testified that he verbally instructed Petitioner that the form provided information regarding his *Miranda* rights and asked him to read it, and if he did not have any questions regarding his rights after reading it, sign it (Dkt. 10, Ex. 001, Vol. IV at 371). Petitioner does not deny signing the form (Dkt. 10, Ex. 001, Vol. IV at 378-84). Following a hearing on the motion to suppress, during which the trial court heard testimony from the interrogating officers and Petitioner, the motion was denied (Dkt. 10, Ex. 001, Vol. IV at 388).

The voluntariness inquiry turns on whether the confession was the product of a free and deliberate choice rather than intimidation, coercion or deception, see *Moran v. Burbine*, 475 U.S. 412,421(1986), and focuses on police overreaching, see *Colorado v. Connelly*, 479 U.S. 157,170(1986) (a defendant's perception of coercion, which is solely caused by his unique mental status, is not a factor). Both of these Inquiries are based upon the totality of the circumstances. See *Moran*, 475 u.s. at 421.

During the suppression hearing, Petitioner did not give the trial court any reason to find that the officers' conduct during the interview at his residence and during the interrogation was coercive in anyway. Further, no police impropriety is apparent from the record. Petitioner acknowledged that he never asked for an attorney and stated that he did not say, in so many words, that he wanted to remain silent. Petitioner stated that he would use terms like "I would rather not talk any more or speak any longer." When

the officer would ask a question Petitioner would answer "'No. That's it.' in other words, that's my answer. That's all I have to say." (Dkt. 10, Ex. 001, Vol. IV at 383-84) When asked if he repeated to the officer that he did not wish to answer any questions, and Petitioner responded that "I kept telling him, 'No. That's it. It's no.'" *Id.* Petitioner further testified that there were no threats made against him or other attempt at physical intimidation. *Id.*

Petitioner fails to point to clear and convincing evidence which rebuts the presumption of correctness accorded the finding of voluntariness implicit in the trial court's denial of the motion (Dkt. 10, Ex. 001 Vol. IV at 388). Thus, Petitioner has failed to demonstrate by clear and convincing evidence that the state court's decision is contrary to or an unreasonable application of clearly established Supreme Court law or an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. 2254(d). Petitioner has not established that he is entitled to relief on this claim.

Ground Five

Petitioner asserts that he was denied his Sixth Amendment tight to effective assistance of counsel when trial counsel failed to make an adequate objection to the trial court's order directing that the general public be removed from the courtroom during the victim's testimony. He points out that counsel argued on direct appeal that the trial court erred in excluding Petitioners family from the courtroom during the victim's testimony but did not address the exclusion of the general public. He also asserts that appellate counsel was ineffective for failing to bring a decision from a sister district to the appellate court's attention while his appeal was pending. See *Williams v. State*, 566 So.2d 6 (Fla. 4th DCA 1999).

Ineffective Assistance of Counsel

To establish a prima facie claim of ineffective assistance of counsel, Petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Deficient performance is performance which is objectively unreasonable under prevailing professional norms. *Id.* at 688. Prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Eleventh Circuit has held that "[w]hen applying *Strickland,* we are free to dispose of ineffectiveness claims on either of its two grounds." *Oats v. Singletary,* 141 F,3d 1018,1023(11th Cir. 1998); *Sims v. Singletary,* 155 F.3d 1297,1305 (11th Cir. 1998) (citing *Strickland v. Washington,* 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.")).

In evaluating whether appellate counsel's performance was deficient, counsel's performance must be evaluated for "reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. "To state the obvious: trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But the Issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled." *Chandler v. United* States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Burger v. Kemp,* 483 U.S. 776(1987)). Courts should presume effectiveness and should avoid second-guessing with the benefit of hindsight. *Id.* at 689.

A petitioner satisfies the prejudice prong of *Strickland* when he or she can show that appellate

counsel's performance was sufficiently deficient to deprive the defendant of "a trial [or an appeal] whose result [was] reliable." *Strickland*, 466 U.S. at 687. However, appellate advocates are not required to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745 (1983). An effective appellate counsel "winnows out' weaker arguments even though the weaker arguments may be meritorious. *Id.* at 751-52. Even though a non-appealed issue might have been successful, the appellate advocacy must be judged in its entirety. *Heath v. Jones*, 941 F.2d 1126, 1130-31(11th Cir. 1991), *cert, denied*, 502 U.S. 1077(1992) (citing *Smith v. Murray*, 477 U.S. 527 (1986)). To determine prejudice, the Court must first perform "a review of the merits of the [omitted or poorly presented] claim." Cross *v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990).

Trial Counsel

In his Rule 3.850 motion, Petitioner asserted that trial counsel was ineffective for failing to object to the trial court's order excluding the general public from the courtroom, thus failing to preserve the issue for appeal. On direct appeal, however, Petitioner argued that the trial court erred in excluding his family from the courtroom (Dkt. 10, Ex. 002). He did not raise an argument about excluding the general public. *Id.* In his Rule 3.850 motion, on the other hand, Petitioner's argument was premised on the exclusion of the general public during the victim's testimony (Dkt. 10, Ex. 12). In Its order denying that motion, the trial court found:

> The Court, having reviewed the Motion with attached memorandum of law, court files, record, and being otherwise advised In the premises, hereby finds and determines that

Defendant Is not entitled to relief.

On December 10, 1997, Defendant was found guilty by a jury of one count of sexual battery (victim less than 12) and one count of a lewd and lascivious act (In presence of child). On January 28, 1998, the court sentenced Defendant to life in prison on count one and 35 months Florida State Prison as to count two. Both counts to run concurrently with each other. (*See* Judgment and Sentence attached).

On February 16, 1998, Defendant filed a Notice of Appeal of his Judgment and Sentence. On June 7, 1999, the Second District Court of Appeal Issued Its Mandate *per curiam* affirming the Judgment and Sentence.
(See Mandate and Opinion, attached).

Defendant raises one ground of ineffective assistance of counsel in his motion.

To have a facially valid claim of ineffective assistance of counsel, Defendant must meet the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). This two part test required the movant to

a. State the specific acts or omissions which constitute the alleged ineffectiveness, and

b. Show that there is no [sic] reasonable probability that the result would have been different in the absence of any deficient performance.

The Defendant bears the burden to show that a specific, serious deficiency of defense counsel, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the Defendant to the extent that there is a likelihood that defense counsel's deficient conduct affected the outcome of the proceeding. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 694-95.

Defendant alleges that trial counsel was ineffective for failing to make an adequate objection to the clearing of the courtroom by the trial court during the alleged victim's testimony. He claims that counsel objected only to the exclusion of Defendant's family, and agreed to the exclusion of members of the general public. Defendant further asserts that if an adequate objection had been made his appeal would have been successful and a new trial ordered.

However, except for changes in decisional law rendered subsequent to final appeal, matters which could have or should have been raised an direct appeal may not be considered by a rule 3.850 motion for post-conviction relief. *State v. Glenn*, 558 So.2d 4 (Fla. 1990) citing *Smith v. State*, 453 So.2d 388 9Fla. 1984); *McCrae* V. *State*, 437' So.2d 1388 (Fla. 1983). *See also Jones v. State*, 652 So.2d 449 (Fla. 3d DCA 1994) (court considered Defendant's post-conviction motion a "classic example of abuse of process" as issues in motion had previously been decided on direct appeal). In his Motion,

> Defendant acknowledges that the issue he has raised In his post-conviction pleading was previously raised on direct appeal. Therefore, this issue is foreclosed from consideration under post-conviction relief. *(See* Defendants Motion for Post-conviction Relief, Memorandum of law, attachments and Judicial Acts to be Reviewed).
>
> Even assuming that this issue was properly before this Court, Defendant has failed to adequately illustrate how counsel's failure to object to the exclusion of members of the general public while the victim testified would have affected the outcome of the proceedings. Defendant has failed to satisfy the *Strickland* test and is therefore not entitled to relief.

Dkt. 10, Ex. 12.

Respondent argues that since Petitioner is barred from raising the federal constitutional aspect of this claim in state court, this Court should recognize the state procedural bar as an independent and adequate state ground barring review In this Court. See *Henderson v. Campbell*, 353 F.3d 880, 891 (11th Cir. 2003) (finding that petitioner who "failed to properly exhaust these claims in the state courts, and now is undeniably barred by firmly established and consistently applied state procedural rules from raising them, the claims are procedurally defaulted, and our review is precluded by this adequate and independent state procedural ground" (footnotes omitted)); *Upshaw v. Singletary*, 70 F.3d 576 (11th Cir. 1995). Like *Henderson*, Petitioner's claim is procedurally defaulted because any new petition would be barred in state court by Florida procedural rules, including the statute of limitations. *See* Fla. R. Crim.

P. 3.850.[9]

However, Petitioner's claim has a more immediate flaw. As set forth *supra*, when Petitioner was tried, the Florida statute governing trials during which child victims testify concerning a sex offense required the general public to be excluded while the victim testified. Thus, trial counsel's failure to raise an objection to the trial court's decision to exclude the general public from the courtroom was not deficient. Counsel cannot be ineffective for failing to advance an argument directly at odds with an applicable statute.

Petitioner has not demonstrated that he is entitled to relief on this claim.

Appellate Counsel

Petitioner argues that appellate counsel was ineffective for failing to bring a decision from a sister district to the attention of the appellate court considering his appeal. Petitioner unsuccessfully raised this claim in his state habeas petition.

Petitioner contends that appellate counsel was ineffective for failing to bring the decision in *Williams v. State*, decided while Petitioner's appeal was pending, to

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[9] The failure of a federal habeas petitioner to adhere to state procedural rules governing the timely presentation of claims will bar federal review of those claims in a subsequent federal habeas corpus proceeding. *See Wainwright v. Sykes*, 433 U.S. 72(1977); *Sims* v. *Singletary*, 155 F.3d 1297, 1311(11th dr. 1998). The federal habeas court must defer to the state court's interpretation of its procedural rules, and must enforce those rules as well as enforcing the procedural rulings of the state courts. *See Lindsey v. Smith*, 620 F.2d 1137(11th dr. 1989).

the attention of the appellate court as supplemental authority.[10] Petitioner argues that if the appellate court had been furnished a copy of the *Williams* decision, the court would have certified a conflict between the district courts of appeal to the Florida Supreme Court and the outcome of his appeal would have been different.

Williams would not have been, however, controlling precedent in the Florida Second District Court of Appeal and Petitioner's argument concerning what the Supreme Court of Florida would have done regarding any conflict between the Florida district courts of appeal is speculative at best. Moreover, *Williams* is distinguishable from the instant case. The reversal In *Williams* was due in large part to the trial court's failure to make any findings in support of its decision to exclude the public from the courtroom during voir dire. 735 So.2d at 700. In this case, the trial court made findings prior to excluding Petitioner's family from the courtroom. Thus, appellate counsel's failure to supplement the appellate record with a citation of *Williams* was hardly unreasonable under prevailing professional norms. *See Strickland, 466* U.S. at 688.

Petitioner has not rebutted the presumption of correctness accorded the factual findings of the state courts. The denial of Petitioner's state habeas petition cannot be said to have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or an unreasonable application of the law to the facts. 25 U.S.C. § 2254(d)(1).

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[10] 736 So.2d 699 (Fla. 4th OCA 1999) (finding that when a violation of the right to a public trial is established, the defendant is not required to prove specific prejudice, it is presumed) (citation omitted).

Conclusion

For reasons set forth *supra*, the Court finds that Petitioner has not demonstrated that he is entitled to federal habeas relief.

ACCORDINGLY, it is ORDERED and ADJUDGED:

1. The Petition for Writ of Habeas Corpus is DENIED (Dkt. 1).

2. The Clerk shall enter judgment against Petitioner, terminate all pending motions, and close this case.

ORDERED in Tampa, Florida, this 19th of April, 2004.

S/
JAMES D. WITTEMORE
UNITED STATES DISTRICT JUDGE

Copy to: All Parties of Record
SA:jsh

APPENDIX 5
5-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROGER LAPLANTE,
Petitioner,

v. Case No. 8:OOCV-2609-T-27TGW

JAMES CROSBY,
Respondent.

ORDER

Before the Court is a Petition for 28 U.S.C. §2253 Certificate of Appealability of Order Denying Writ of Habeas Corpus (Dkt. 32). On May 13, 2004, Petitioner filed a notice of appeal of the order denying his petition for writ of habeas corpus, which was construed as an application for certificate of appeal ability (hereinafter COA") pursuant to Rule 22, Fed. R. App. P. (Dkt. 30). Finding that Petitioner failed to satisfy the two-prong test set out in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), this Court denied the construed request for a COA (Dkt. 31). Upon reconsideration, that order is vacated and Petitioner's petition for a COA (Dkt. 32) is granted in part.

Petitioner requests a COA on the following issues:

1. Denial of his Sixth Amendment right to have an open and public trial;

2. The lack of the constitutionally required corroboration necessary as a predicate to the admission of alleged statements, confessions, or admissions of the Petitioner; and

3. The lack of constitutionally sufficient evidence to sustain the conviction.

(Dkt. 32 at 1).

Petitioner's petition for federal habeas relief was denied on the merits. Accordingly, to obtain a COA, he must demonstrate that reasonable jurists would find the assessment of his constitutional claims debatable or wrong. See *Slack*. 529 U.S. at 484; *Eagle v. Linahan*, 279 F.3d 926,935(11th dr. 2001). Having considered the arguments advanced in support of the request for a COA and controlling case law, the Court finds that reasonable jurists could find its assessment of Petitioners claim that he was denied his Sixth Amendment right to an open and public trial debatable or wrong and therefore a COA should be granted on that issue. In all other respects, the petition for a COA is denied. Petitioner has failed to demonstrate that reasonable jurists would find Its assessment of the remaining constitutional claims asserted in the Petition debatable or wrong.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED**:

1. This Courts May 20, 2004 order (Dkt. 31) Is **VACATED**.

2. Petitioner's petition for certificate of appeal ability (Dkt. 32) is **GRANTED** in part and otherwise **DENIED**. A certificate of appeal

ability is GRANTED with respect to the

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1 Petitioner's request for a COA on the following issues is denied, as he did not raise them in his Petition or otherwise submit argument thereon:

1. The lack of constitutionally required corroboration necessary as a predicate to the admission of alleged statements, confessions, or admissions of the Petitioner and

2. The lack of constitutionally sufficient evidence to sustain the conviction.

Moreover, to the extent the request for a COA can be construed as an attempt to challenge the constitutionality of Fla. Stat. § 918.13 (1997) or assert that trial counsel was Ineffective for failing to challenge its constitutionality (Dkt. 32 at 10), that request is rejected because Petitioner did not raise these issues In his petition or in the state court.

following Issue:

> **Whether the Florida trial court's closure of the courtroom during the 6-year-old child victim's testimony complied with the four-part test set out In *Wailer v. Georgla, 467* U.S. 39,46 n.4 (1984), as applied in *Judd v. Haley,* 250 F.3d 1308, 1314 (11th dr. 2001), Fla. Stat. §918.16 notwithstanding.**

DONE AND ORDERED in Tampa, Florida, this 29th day of June, 2004.

s/
JAMES D. WHITTEMORE
United States District Judge

Copies to:
All Parties of Record
SA/jah

APPENDIX 6
6-1
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENtH CIRCUIT

No. 04-12468-A

ROGER LAPLANTE,

Petitioner-Appellant,

versus

JAMES CROSBY, Secretary, Department of Corrections, CHARLES CRIST, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's motion to expand the certificate of appealability ("COA"), as construed from his motion for a COA, is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

6-2

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

August 27, 2004

Sheryl L. Loesch
Clerk, U.S. District Court
801 N. Florida Ave., Room 220
Tampa FL 33602

Appeal Number: 04-12468-A
Case Style: Roger Laplante v. James Crosby
District Court Number: 00-02609 CV-T-27-TGW

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued in lieu of the mandate of this court. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing." Also enclosed is the record on appeal, which consists of
1 vol. pleadings, 3 expandable folders

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,
THOMAS K. KAHN, Clerk

6-3

Reply To: Deborah Owens (404) 335-6180

Encl.

APPENDIX 7
7-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12468-A

ROGER LAPLANTE,

Petitioner-Appellant,

versus

JAMES CROSBY, Secretary, Department of Corrections,
CHARLES CRIST, Attorney General of the State of Florida,

Respondenta-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Before: TJOFLAT arid MARCUS, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated August 27, 2004, denying his motion to expand the certificate of appealability ("COA"), as construed from the motion for a COA. Appellant's motion for reconsideration is DENIED AS UNNECESSARY. Although this Court denied appellant's motion to expand the COA, appellant still

APPENDIX 8
8-1
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12468
Non-Argument Calendar
D.C. Docket No. 00-02609-CV-T-27-TGW

ROGER LAPLANTE,

Petitioner-Appellant,

versus

JAMES CROSBY, Secretary, Department of Corrections,CHARLES CRIST, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 7, 2005)

Before ANDERSON, DUBINA and MARCUS, Circuit Judges. PER CURIAM:

Roger Laplante, a Florida state prisoner serving a life sentence for sexual battery of a six-year-old child, challenges the district court's denial of his ~ 28 U.S.C. § 2254 habeas petition. The district court granted a certificate of appealability ("COA"), on the following issue: "whether the Florida trial court's

closure of the courtroom during the 6-year-old child victim's testimony complied with the four-part test set out in Waller v. Georgia, [467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31(1984)], as applied in Judd v. Haley, 250 F.3d 1308, 1314 (11th Cir. 2001), Fla. Stat. § 918.16 notwithstanding."[1]

We review a district court's grant or denial of a § 2254 habeas petition de novo. See Sims v. Singletary, *155* F.3d 1297, 1304 (11th Ur. 1998). In Williams v. Taylor, *529* U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court set forth the standard of review to be applied to a state prisoner's application for habeas relief brought pursuant to 28 U.S.C. § *2254.* According to the

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[1] The COA is limited to this issue. Laplante filed a motion to expand the COA, which we previously denied, both on initial consideration and on reconsideration. Accordingly, we will consider Laplante's argument only on the COA's issue, and not on additional arguments that are beyond the scope of the COA. See Dorsey v. Chapman, 262 F.3d 1181, 1185 n.3 (11th Cir. 2001) (declining to address issues not included in the COA granted by the district court).

We also note that Laplante's assertion that the trial court's closure of the courtroom violated Florida law does not provide a basis for federal habeas relief Cf Branan v. Booth, 861 F.2d 1507, 1508 (11th Cir. 1988) ("a habeas petition grounded on issues of state law provides no basis for habeas relief"). Thus, in addition to being beyond the scope of the COA, that argument is not an appropriate ground for federal habeas relief

Court, § 2254(d)(1) "prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.'" Id. at 399, 120 S. Ct. at 1516 (quoting 28 U.S.C. § 2254(d)(1)).

After thorough review of the record, including the pertinent transcripts, and careful consideration of the parties' briefs, we find no reversible error and affirm.

Laplante was tried and convicted of one count of sexual battery on a child less than twelve years of age and one count of lewd and lascivious acts in the presence of a child, all in violation of Florida law. Pursuant to Fla. Stat. § 918.16,[2] the state trial court closed the courtroom during the testimony of the six-year-old victim concerning her contact with Laplante. Upon the State's request for the closure, the trial court, without objection by Laplante, ordered the general public's exclusion during the victim's testimony. Over Laplante's subsequent objection, the trial court also excluded Laplante's family from the courtroom during the testimony.

On direct appeal from his conviction, Laplante

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[2] The applicable version of § 918.16 provided:

> In the trial of any case, civil or criminal, when any person under the age of 16... is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney's office.
>
> Fla. Stat. § 918.16 (1997).

argued that the trial court's closure of the courtroom did not comply with the Supreme Court's decision in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31(1984), which, the parties agree, is the clearly established federal law, within the meaning of the AEDPA, on the issue of courtroom closures in circumstances such as those presented here. Thus, Laplante exhausted this claim in the state court proceedings prior to bringing this federal habeas action. The state appellate court affirmed Laplante's conviction in a per curiam summary decision. See Laplante v. State, 736 So. 2d 1190 (Fla Dist. Ct. App. 1999) (Table).

Laplante then filed this claim for federal habeas relief, again asserting a violation of Waller based on the closure of the courtroom, including exclusion of his family members, during the victim's testimony.[3] In Waller, the state trial court closed a suppression hearing over the objection of the defendant on account of the privacy interests of certain individuals who could be heard on the various wiretap recordings that were to be presented. ~ 467 U.S. at 41-42, 104 S.Ct. at 2212-13. The Supreme Court held that in order for the closure of the suppression hearing to be in accordance with the defendants' Sixth Amendment

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[3] The parties debate whether this case involves a total closure or a partial closure, within the meaning of Fla. Stat. § 918.16 and our decisions in Judd and Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). For purposes of our analysis of the Waller claim, we assume, without deciding, that this was a total closure and, accordingly, the state court's decision had to satisfy the Waller test. See Judd, 250 F.3d at 1315 (observing that in both partial and total closures, "a court must hold a hearing and articulate specific findings," but holding that only a total closure must "satisfy the elements of the more rigorous Waller test." (quotation omitted)); cf. Douglas, 739 F.2d at 532 (finding courtroom closure was only partial because "the press and family members of the defendant, witness, and decedent were allowed to remain").

rights,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2~ the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48, 104 S. Ct. at 2216. The Court then determined that the closure in that case was plainly not justified because (1) "the State's proffer was not specific"; (2) "the trial court's findings were broad and general"; (3) "[t]he court did not consider alternatives to immediate closure of the entire hearing"; and (4) "the closure was far more extensive than necessary." Id. at 48-49, 104 5. Ct. at 2216-17.

Here, in rejecting Laplante's argument based on Wailer, the district court observed the following:

> Petitioner has not established that the trial court's decision to close the courtroom during the child victim's testimony was contrary to or an unreasonable application of the Supreme Court holding in Waller, and its progeny. The trial court made sufficient factual findings to enable a review of whether the decision to close the trial was appropriate and no broader than necessary to protect the child's interests, considering Supreme Court precedent. Those findings addressed the child's tender age, the sensitive and potential traumatic nature of her expected testimony and the necessity of protecting her interests over the Sixth Amendment rights of the Petitioner. The court appropriately weighed

> the competing interests, considered the manner in which the competing interests could best be served and found that the state had an overriding interest in the victim's welfare which outweighed Petitioner's Sixth Amendment right to a public trial.
>
> Petitioner has failed to demonstrate by clear and convincing evidence that the state court's decision was contrary to or an unreasonable application of clearly established Supreme Court law or an unreasonable determination of the facts in light of the evidence.(footnote omitted).

We too conclude that the state trial court's closure of the courtroom during the victim's testimony, as well as the state appellate court's affirmance of that decision in Laplante's direct appeal raising this Waller claim, was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law, as stated in Waller. On the first factor, the prosecutor stated that she wanted the courtroom closed so that "the child [could] testify in relative calm." The state trial court took this to mean the prosecutor was concerned with "the protection of this child." The Supreme Court has recognized the protection of "the physical and psychological well-being of a minor" is a "compelling" state interest in the context of a courtroom closure during a criminal trial involving the forcible rape and forced unnatural rape of three minors. Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620 (1982).

As for the second Waller factor, although the prosecutor sought a total closure during the trial, with the exception of the victim's advocate, the state trial court limited the total closure to the minor-victim's

testimony. Laplante did not object to the initial request for a closure, and when he objected to the exclusion of members of his family, the trial court found that the protection of the child (a compelling state interest under Globe Newspaper) required the family members to be excluded along with the general public.

On the third factor, it is clear that the state trial court considered other alternatives, including whether to close the courtroom to everybody, including the defendant's family and the victim's advocate. The trial court ultimately concluded that the victim's advocate should be permitted to remain and, therefore, modified the original ruling excluding everyone. After considering further argument on why the defendant's family also should remain, the court concluded that "in this particular instance the protection of this child outweighs any Sixth Amendment right that [Laplante] may have to have the members of his family present."

Finally, on the fourth Waller factor, the trial court's findings were adequate to support its decision to close the courtroom. Some factors that are important to consider include "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." Globe Newspaper, 457 U.S. at 608, 102 S.Ct. at 2621 (footnote omitted); see also Judd, 250 F.3d at 1319 (discussing the lack of evidence on some of these factors). Here, the state court considered: (1) the victim's age, commenting about "the young age of the child," and also noting that she was "a six-year-old"; (2) the psychological maturity and understanding of the victim when the court expressed its understanding that she was going to testify concerning "areas that are going to be extremely sensitive to the child and possibly

traumatic"; (3) the nature of the crime and the resulting testimony that would be elicited, noting more than once that this was a "sexual battery" case, and also that the testimony would concern "extremely sensitive" facts; and (4) the interests of the victim's relatives when it allowed for the victim's aunt, who was also acting as the victim's advocate, to remain present during the testimony.

On this record, neither the state trial court's decision to close the courtroom nor the state appellate court's rejection of Laplante's Waller claim was contrary to, or an unreasonable application of, Waller. Although the sate trial court did not explicitly state it was applying the Waller test, we readily conclude that it was not objectively unreasonable for the state appellate court to affirm the trial court's decision. Accordingly, we affirm the denial of federal habeas relief.

AFFIRMED.